

## QUARTERLY REPORT

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The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at [<kmcdowel@doe.state.in.us>](mailto:kmcdowel@doe.state.in.us).

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## EDUCATIONAL MALPRACTICE: EMERGING THEORIES OF LIABILITY

On April 25, 2001, the Iowa Supreme Court tiptoed into the minefield of “educational malpractice” when it decided that a high school guidance counselor was liable for incorrect advice provided to a student who subsequently failed to qualify for a college basketball scholarship because of a deficient academic record. Sain v. Cedar Rapids Community School District, 626 N.W.2d 115 (Iowa 2001).

Sain was an all-state basketball player. His guidance counselor was “generally familiar” with course requirements imposed by the National Collegiate Athletic Association (NCAA) for incoming student-athletes to be eligible to compete at Division I institutions. One of these requirements is to complete three years of English courses approved by the NCAA.<sup>1</sup>

During his senior year, the student had been enrolled in “English literature,” an approved course, but he sought to drop it. He met with his guidance counselor, who suggested the student enroll in “Technical Communications,” a new course the counselor thought would be compatible with Sain’s interest in computers. The counselor also thought this course would be approved by the Clearinghouse; however, the course had not been submitted for consideration.

Sain was offered and accepted a basketball scholarship to a Division I university. Following graduation, Sain was informed by the Clearinghouse that the “Technical Communications” course was not an approved course on the NCAA’s list. As a result, he was one-third of a credit short of NCAA English requirements necessary to participate as a freshman in NCAA-sanctioned sports at the Division I level. Sain lost his scholarship.

He sued the school district and the guidance counselor for negligence and negligent misrepresentation based upon the school’s failure to submit the course to the Clearinghouse and for breach of “a duty to provide competent academic advice.” At 120. The trial court dismissed the claim against the school district because the claim was essentially one for “educational malpractice,” which is not recognized in Iowa, and dismissed the claim against the counselor because there is no duty owed to the student “to use reasonable care in providing course information.” The trial court also found that claims for “negligent misrepresentation” apply to commercial or business transactions and not to an educational setting.

Sain appealed, arguing that the student-counselor relationship “imposes a duty on the counselor to use reasonable care when giving specific information about the course requirements for admission to college or participation in college and [in] submitting courses to the NCAA for approval.” He also asserted the tort of “negligent misrepresentation is broad enough to hold a guidance counselor liable for providing specific information to a student pertaining to the required courses and credits necessary to pursue post-high school goals.” Id.

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<sup>1</sup> The NCAA’s list of approved courses is determined by a separate organization known as the NCAA Initial Eligibility Clearinghouse (“Clearinghouse”), which evaluates and approves courses submitted by high schools. The list is updated annually and provided to high schools. 626 N.W.2d at 119.

The Iowa Supreme Court, 7-2, reversed the trial court, taking great pains to avoid characterizing Sain's claims as "educational malpractice." The court acknowledged that Iowa does not recognize three (3) categories of "educational malpractice":

1. Basic academic instruction or misrepresentation of the level of academic performance;
2. Placing or failing to place a student in a specific educational setting; and
3. Supervision of student performance.

There are five (5) policy reasons for refusing to recognize such causes of action:

1. The absence of an adequate standard of care;
2. The uncertainty in determining damages;
3. The burden placed on schools by the potential flood of litigation that would result;
4. The deference given to the educational system to carry out its internal operations; and
5. The general reluctance of courts to interfere in an area regulated by legislative standards.

At 121. Although "educational malpractice" defies precise definition, the court described it as an action centering "on complaints about the reasonableness of the conduct engaged in by the educational institutions providing their basic functions of teaching, supervising, placing, and testing students in relationship to the level of academic performance and competency of the student." *Id.* "The theory alleges professional misconduct analogous to medical and legal malpractice, and seeks to impose a duty on schools to provide a level of education appropriate for the students." *Id.*<sup>2</sup>

Educational malpractice is almost universally rejected as a cause of action because the issues framed by the claim must necessarily be answered in the context of those principles of duty and reasonableness of care associated with the tort law of negligence.

*Id.* The majority opinion then attempted to distinguish Sain's claim from one for educational malpractice:

- Sain's claim is based on misrepresentation and does not challenge classroom methodology or theories of education. At 122.

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<sup>2</sup>See Timothy Davis, "Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student-Athletes?" 69 *Denver University Law Review* 57 (1992), which the Iowa Supreme Court cited to in several respects.

- His claim is unrelated to academic performance or the lack of expected skills. Id.
- The claim does not intrude upon the internal operations, curriculum, or academic decisions of an educational institution. Id.
- It does not interfere with the legislative standards for schools. Id.

Rather, Sain's claim "asserts a specific act of providing specific information requested by a student under circumstances in which the school knew or should have known the student was relying upon the information to qualify for future athletic opportunities." Id. In other words, the claim is not one for "educational malpractice" but for "negligent misrepresentation." As such, a standard of care can be articulated and damages ascertained.

### ***Negligent Misrepresentation***

The typical elements of negligence include a duty, a breach of care, proximate cause, and damages. "Misrepresentation" is recognized as a cause of action based upon negligent conduct that results in personal injury or property damage. Where the loss is a matter of economic harm and not personal injury, judicial review is more restricted to whether there was foreseeability of such economic harm arising from the providing of misinformation. Courts have recognized that other professionals (e.g., accountants, lawyers) "owe a duty of care in supplying information to foreseeable third parties as members of a limited class of persons who would be contemplated to use and rely upon the information." At 123. The questions, then, are whether the guidance counselor "is in the business or profession of supplying information to others"; whether he owed a duty of care to Sain; and whether a "special relationship" arose that imposed a duty of care. At 124.

[A] person in the profession of supplying information for the guidance of others acts in an advisory capacity and is manifestly aware of the use that the information will be put, and intends to supply it for that purpose.

At 124-25. Such a person should understand the "magnitude and probability of the loss that might attend the use of the information if it is incorrect." It would be this understanding of the use of such information that would constitute the "foreseeability of harm" element that would support the imposition of a duty of care. At 125. This would not apply where the misinformation was "given gratuitously or incidental" and not provided as a part of one's profession.

The court observed that negligent misrepresentation has been applied only within a business or commercial context and has never been applied to a school counselor-student relationship. The guidance counselor, however, is paid by the school district to provide advice to students. The advice is for the benefit of the students. This advisory role of the school counselor is not gratuitous; the school counselor is aware that the students will make use of such information; and the students are relying upon the information provided. At 126.

Considering the rationale which supports the imposition of a duty of care on a person in the business or profession of supplying information, we discern no reason why a high school counselor should not fall within the category as a person in the profession of supplying information to others to support the imposition of a duty of reasonable care in the manner he or she provides information to students.

Id. The court, then, is including high school guidance counselors within the class of “professional purveyors of information to others.” Id.

The court acknowledged that its holding may have a “chilling effect” upon school counselors “who may refrain from providing information because of the potential for liability.” This fear, the majority opined, is unnecessary.

[L]iability for negligent representation is limited to harm suffered by a person for whose benefit and guidance the counselor intended to supply the information or knew the recipient intended to supply it and to loss suffered through reliance upon the information in a transaction the counselor intended the information to influence.

At 127. This would apply only “to false information” and not “to personal opinions or statements of future intent.” The court’s new standard “is only one of reasonableness and the elements of proximate cause and damage must also be shown.” Id. This does not negate any immunity, absolute or qualified, that state statute may provide for school personnel. At 127-28.<sup>3</sup> The majority concluded at 129:

The tort of negligent misrepresentation is broad enough to include a duty for a high school guidance counselor to use reasonable care in providing specific information to a student when the guidance counselor has knowledge of the specific need for the information and provides the information to the student in the course of a counselor-student relationship, and a student reasonably relies upon the information under circumstances in which the counselor knows or should know that the student is relying upon the information.

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<sup>3</sup>This issue was addressed directly in Poe v. Hamilton, 565 N.E.2d 887, 889 (Ohio App. 1990), where a student sued her psychology teacher because she failed the course, preventing her from graduating with her class. The school board had certain minimum standards teachers were required to meet, such as number of tests and issuance of progress reports, which the teacher did not satisfy and for which he was reprimanded. However, the carelessness standard for negligence does not apply where the alleged negligence involves a public employee. A more rigorous standard—“with malicious purpose, in bad faith, or in a wanton or reckless manner”—would be applied, which would require the teacher to “perversely disregard a known risk” in order to lose immunity. The court also cited the Donahue case, *infra*, in support of the important public policy against judicial intervention of the professional judgment of educators in determining appropriate methods of teaching.

## ***The Dissent***

The two dissenting justices accused the majority of “exalt[ing] logic over experience. The result spells disaster for the law. For, as we all know, the life of the law is not logic but experience.”<sup>4</sup> The dissent noted that a guidance counselor must “dispense volumes of information on a daily basis,” and to equate the guidance counselor’s function with typical business transactions requires “one...to view the mentoring relationship between a guidance counselor and a student as no different [from] a business relationship between a purveyor of information and a consumer... We may live in an information age, but experience tells [us] the sharing of knowledge in school is different [from] the sale of information in the marketplace.” *Id.*

In parting, the dissenting justices warned at 130:

Implicit in the majority’s reasoning is the suggestion that, when it comes to the NCAA eligibility rules and athletic scholarships, business is the name of the game. But the cause of action we recognize today will not be limited to athletes. It will apply to all students whether talented in music or debate or academics. Instead of encouraging sound academic guidance, [this] decision will discourage advising altogether.

## ***Educational Malpractice Generally***

The general theory in most educational malpractice claims revolves around a core duty to educate students. If a student doesn’t learn, or graduates without the skills necessary for post-secondary employment or educational opportunities, the school has failed to discharge its theoretical duty. The failure to discharge this duty must be the proximate cause of the injury the student has suffered.<sup>5</sup> The alleged injury—with its resulting impairment of post-secondary opportunities, including meaningful employment—should be remedied through monetary damages for lost income. This is a variation on the negligence theories for medical and legal malpractice actions.

As noted in *Sain, supra*, a plaintiff, in order to be successful on an educational malpractice theory, must demonstrate:

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<sup>4</sup>This is a famous quotation by the late Supreme Court Justice Oliver Wendell Holmes, Jr., in *The Common Law* (1881). Justice Holmes is also known as “The Great Dissenter.”

<sup>5</sup>In 1992, the Indiana General Assembly nearly imposed a standard that may have supported claims for educational malpractice. Through Public Law (P.L.) 19-1992, Sec. 28, the legislature created I.C. 20-10.1-4.8 *et seq.*, which would have resulted in a public school providing to prospective employers a “guarantee of essential skills” for its graduates. A prospective employer, who determines the graduate has “job deficiencies” related to the lack of “essential skills,” could have referred the graduate to his public school for retesting and, if necessary, retraining. The law was repealed by P.L. 340-1995, Sec. 106, before it became fully effective.

1. The school had a legal duty to educate him;
2. The school failed to exercise a reasonable standard of care in discharging this duty;
3. There was some ascertainable injury to the plaintiff;
4. The school's alleged breach of its duty was the proximate cause of that injury; and
5. The injury the student suffered is quantifiable in the sense that compensatory damages can be calculated that would restore the plaintiff to where he would have been but for the school's breach of its duty to him.

Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854 (Cal. App. 1976) is generally acknowledged as the first educational malpractice case.<sup>6</sup> The student sued the school after graduation because he had only a fifth-grade reading ability that limited his economic opportunities to menial occupations. The court refused to apply traditional standards of negligence to an educational setting. The duty of care owed the student, the court wrote, extended only to the physical safety of the student while under the school's supervision. 131 Cal. Rptr. at 858. The court also noted there are many factors that can affect a student's level of achievement:

[A]chievement of literacy in the schools, or its failure, [is] influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived; recognized but not identified.

At 861. The court also noted that there are conflicting theories and methodologies that tend to obscure any "readily acceptable standards of care, or cause, or injury." At 860.

In addition, there are significant public policy considerations that militate against such actions. There would be a flood of litigation with the "prospect of limitless liability for the same injury." Id. Schools would be exposed to tort claims "real or imagined, of disaffected students and parents in countless numbers," which would significantly burden schools and society as a whole with the expenditure of public time and money in defending such actions. At 861. The Peter W. case continues to be the bellwether for subsequent educational malpractice disputes, although there have been more recent, creative litigation efforts to disguise such claims as different types of actions. See *infra*.

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<sup>6</sup>See Albert C. Jurenas, "Will Educational Malpractice be Revived?" 74 *Ed. Law Rep.* 449, 451 (1992); Martha McCarthy, "Professional Malpractice: Are Educators at Risk?" *Indiana Education Policy Center: Policy Bulletin* (June 1992); and Sharan Brown, Kim Cannon, "Educational Malpractice Actions: A Remedy For What Ails Our Schools?" 78 *Ed. Law Rep.* 643, 645 (1993).

## ***Educational Malpractice In Indiana***

Indiana has long declined to recognize the tort of “educational malpractice.” In Timms v. MSD of Wabash Co., *Education of the Handicapped Law Report* (EHLR) 554:361 (S.D. Ind. 1982), an officially unpublished decision, the federal district court specifically rejected such a claim made on behalf of a student with severe disabilities who alleged denial of a free appropriate public education under what is now known as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*

The basis of plaintiffs’ claim can only be a theory of educational malpractice. While it is true that Indiana courts have recognized that teachers may be liable for active negligence which caused the wrong, *Medsker v. Etchison*, 101 Ind. App. 369, 199 N.E. 429 (1936), cases awarding compensation have always concerned physical injury. There are no Indiana cases on record in which relief has been granted for negligence in making a school placement decision. No cases from other jurisdictions in which relief has been awarded for educational malpractice have come to the Court’s attention.

EHLR at 554:370. The court noted cases from other jurisdictions that have rejected such claims, adopting the reasoning in D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981):

In particular we think that the remedy of money damages is inappropriate as a remedy for one who has been a victim of errors made during his or her education. The level of success which might have been achieved had the mistakes not been made will, we believe, be necessarily incapable of assessment, rendering legal cause an imponderable which is beyond the ability of courts to deal within a reasoned way.

Id., quoting D.S.W., 628 P.2d at 556. Although the district court’s decision in Timms is officially unpublished, the published opinion of the 7<sup>th</sup> Circuit Court of Appeals noted the district court’s finding that Indiana does not recognize the tort of educational malpractice. See Timms v. MSD of Wabash Co., 722 F.2d 1310, 1319, *n.* 6 (7<sup>th</sup> Cir. 1983).

The issue was revisited in Bishop v. Indiana Technical Vocational College, 742 F.Supp. 524 (N.D. Ind. 1990), when the court dismissed as frivolous a former student’s claim for educational malpractice against the vocational school, alleging civil rights violations and seeking \$80,000 in compensatory damages. However, “Educational malpractice, without more, is simply not a constitutional deprivation,” the court stated at 525. “Neither does the tort of educational malpractice attain constitutional significance if one characterizes it as a breach of contract. Simple breach of contract, like medical malpractice, is not a constitutional deprivation...” Id. Whether educational malpractice exists at all is a function of state law “that does not, by itself, deprive its victims of their constitutional rights.” Id., citing Ross v. Creighton University, 740 F.Supp. 1319 (N.D. Ill. 1990), which refused to recognize educational malpractice as a tort under Illinois law.



There is also an important distinction between Iowa and Indiana case law. Indiana does not recognize the possibility of an athletic scholarship as a protectable property interest, at either the state or federal level. Indiana High School Athletic Assoc. v. Carlberg, 694 N.E.2d 222, 241, *n.* 26 (Ind. 1997), citing to Schail v. Tippecanoe Co. Sch. Corp., 679 F.Supp. 833, 855 (N.D. Ind. 1988) (“[S]tudent’s aspirations for a college scholarship from high school sports...do not establish any legally protected interests.”), *affirmed*, 864 F.2d 1309 (7<sup>th</sup> Cir. 1988).<sup>7</sup>

### *Alternative Theories: Variations on a Theme*

#### **State Constitutional Challenges**

In most states, the requirement to make available publicly funded education is a function of state constitution. Indiana’s constitution provides, in relevant part, that the legislature shall “...provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.” Art. 8, §1. This is not particularly lofty language; it imposes a relatively straight-forward set of duties: establish a system of schools that is open to all and without tuition charge. But in other states, the constitutional language may incorporate higher ideals, or at least be interpreted as doing so.

The first major educational malpractice action utilizing this strategy was Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979), where a student, similar to Peter W., asserted his school district breached its duty under the New York constitution to “provide for the maintenance and support of a system of free common schools, wherein all the children of [the] state may be educated.” New York’s highest court stated that the constitutional language was “never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education, the breach of which would entitle a pupil to compensatory damages.” 391 N.E.2d at 1353. The court also echoed the strong policy reasons for declining to recognize educational malpractice, but it did not close the door on such claims.

As for proximate causation, while this element might indeed be difficult, if not impossible, to prove in view of the many collateral factors involved in the learning process, it perhaps assumes too much to conclude that it could never be established. This would leave only the element of injury, and who can in good faith deny that a student who upon graduation from high school cannot

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<sup>7</sup>Federal decisions appear to be drifting towards the “property interest” theory. In Washington v. IHSAA, 181 F.3d 840, 853 (7<sup>th</sup> Cir. 1999), the 7<sup>th</sup> Circuit Court of Appeals upheld the federal district court’s finding that Washington, a gifted basketball player, would be irreparably harmed if he did not obtain an injunction against the IHSAA “because if he were not allowed to play, he would lose out on the chance to obtain a college scholarship and he would have diminished academic motivation.” The IHSAA argued that the loss of a potential college scholarship is too speculative to constitute irreparable harm. “However, Purdue University basketball coach Gene Keady testified at the preliminary injunction hearing that Mr. Washington would be harmed by an inability to play basketball in his high school games because basketball scouts would not have an opportunity to view him playing.... The district court’s finding is therefore not clear error.” Id.

comprehend simple English—a deficiency allegedly attributable to the negligence of his educators—has not in some fashion been “injured.”

At 1354-55. The court noted at 1354 that a complaint for “educational malpractice” could be pleaded, depending upon how one views the educator-student relationship.

[T]he imagination need not be overly taxed to envision allegations of a legal duty of care flowing from educators, if viewed as professionals, to their students. If doctors, lawyers, architects, engineers and other professionals are charged with a duty owing to the public whom they serve, it could be said that nothing in the law precludes similar treatment of professional educators. Nor would creation of a standard with which to judge an educator’s performance of that duty necessarily pose an insurmountable obstacle.<sup>8</sup>

In Denver Parents Association v. Denver Board of Education, 10 P.3d 662 (Colo. App. 2000), a class action against the school district, the class alleged the school district breached its duty under Colorado’s constitution and the corresponding statutes by failing to provide its students with a quality education. The plaintiffs alleged the district demonstrated a pattern of poor performance, “dumbed down” academic standards, failed to ensure a safe and secure school environment, and manipulated statistics in order to appear to have improved its graduation rate. The alleged injuries included “irreparable intellectual and emotion harm,” decreased post-secondary opportunities, and a “disproportionate burden” on parents, who have had to supplement their children’s education through tutors, private education, or enrollment in other public school districts. The trial court dismissed the claim as one for “educational malpractice,” and the plaintiffs appealed, asserting that there was a “breach of contract.” The appellate court, however, found that constitutional and statutory mandates do not create a contractual relationship. The parents did not individually bargain for their children’s educational services. The elements of a contractual relationship are absent. The court added at 665:

Plaintiffs cannot hold a public school district to the implementation of its educational objectives in a judicial setting. This matter is of a political nature, inasmuch as the school district is a political entity and, therefore, such policy issues should be addressed at the ballot box, not presented as a judicially enforceable contract claim.

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<sup>8</sup>The court soon found how difficult it is to establish a complaint for “educational malpractice.” Not long after the Donahue case, it had to decide Hoffman v. Bd. of Ed. of City of New York, 400 N.E.2d 317 (N.Y. 1979), where a student with average intelligence but with a “mongoloid” appearance and severe speech deficits was placed in classes for students with mental retardation throughout his public school experience, despite recommendations from the school psychologist that he should be re-tested and scores in the 90<sup>th</sup> percentile in reading readiness tests when he was eight and nine years old. New York’s highest court, by a 4-3 count, reversed the lower court’s award of \$500,000, stating that the administrative remedies available (in this case, under IDEA) are the proper venue. The judiciary should not entertain claims for instructional negligence.

Lewis v. Spagnolo, 710 N.E.2d 798 (Ill. 1999) involves “educational malpractice” claims, although the term is never raised by the plaintiffs and not specifically addressed by the Illinois Supreme Court. The plaintiffs alleged, in part, that they have been deprived of a safe and adequate education by their school district, in contravention of the Illinois Constitution. (There are also allegations of violations of the U.S. Constitution and various Illinois statutes.) They seek supplemental educational services as compensation for the inadequate education provided to them in the past. The Illinois Constitution provides as “[a] fundamental goal” that “educational development” will be provided to its citizens “to the limits of their capacities.” Further, the state is to “provide for an efficient system of high quality public educational institutions and services.” The plaintiffs argued that this entitles them to a “minimally adequate education,” and that they have the right to sue state and local officials directly for deprivation of that right. The court restated its past position in Committee for Educational Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) that “questions relating to the quality of education are solely for the legislative branch to answer.” What constitutes a “high quality” education cannot be judicially ascertained. Perceived deficiencies in the quality of education in public schools are not properly brought to court.<sup>9</sup>

## **Breach of Contract**

Although breach of contract was referenced in Denver Parents Assoc., *supra*, there was no actual contract. Similar allegations have met the same fate. In Whayne v. U.S. Department of Education, 915 F.Supp. 1143 (D. Kan. 1996), the debtor defaulted on his student loan and attempted to avoid repayment because the trade school he attended allegedly failed to properly train him, which he characterized as a breach of contract. The federal district court disagreed, noting that the claim is really one for “educational malpractice,” which Kansas does not recognize. To state a claim for breach of contract, the court noted at 1146, the plaintiff must “do more than simply allege the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor.” See also Lawrence v. Lorain Co. Comm. College, 713 N.E.2d 478 (Ohio App. 1998); André v. Pace University, 655 N.Y.S.2d 777 (N.Y. Sup. 1996), declining to recognize a “breach of contract” based upon a representation that plaintiffs’ respective backgrounds in mathematics were sufficient for an introductory computer programming course;<sup>10</sup> Houston v. Mile High Adventist Academy, 872 F.Supp. 829 (D. Colo. 1994); and Bell v. Bd. of Education of West Haven, 739 A.2d 321, 326 (Conn. App. 1999), sustaining the school’s motion to strike a “breach of contract” challenge to a controversial

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<sup>9</sup>The state constitutional challenges for “educational malpractice” are similar to those cases that challenge the adequacy of school funding. Although the arguments are similar, the courts are more inclined to interpret constitutional provisions related to the adequacy of funding than to fashion individual remedies for alleged educational malpractice.

<sup>10</sup>The plaintiffs had average undergraduate course work in mathematics. The instructor for the computer programming course obviously intended the students to have a higher level of mathematical ability. The question posed at the initial class, which took the plaintiffs weeks to work on (unsuccessfully): What is the cost of an aluminum atom on Fridays? The answer is  $\$6.22054463335 \times 10^{26}$  (less than one-trillionth of a penny). The lawsuit cost much more. See Lance S. Davidson, “School For Scandal,” *Ludicrous Laws and Mindless Misdemeanors* (1998).

methodology employed school-wide, but recognizing two instances where a breach of contract for educational services could exist: (1) where the educational program failed in some fundamental respect, such as by not offering any of the courses necessary to obtain certification or licensure in a certain field; and (2) where the institution failed to fulfill a specific contractual promise distinct from any overall obligation to offer a reasonable program. However, a cause of action in contract for educational claims can exist against a private educational institution when that institution provides no services or does not provide certain specified services. See Squires v. Sierra Nevada Ed. Foundation, 823 P.2d 256 (Nev. 1991) (the parents paid tuition to the private school in exchange for a “quality education” that was to include specified individualized reading instruction and diagnostic and remediation services, but the school misrepresented both its services and the student’s academic progress).

### **School Accountability**

A number of state legislatures are enacting school accountability laws that measure progress towards certain goals, with the possibility that some schools may be taken over by the state for failure to demonstrate such progress. Oftentimes, schools are placed into certain performance categories. Likely arguments will be that a state take-over is tantamount to an admission the school breached some duty for which the state had some responsibility or liability. In addition, much of the school accountability is driven by statistics, and the statistics are often derived from standardized assessments. “High stakes” assessment may raise the stakes as well, particularly if student performance has been tampered with by school personnel attempting to demonstrate this statistical improvement.

### **School Accountability: Standardized Assessment**

Helbig v. City of New York, 622 N.Y.S.2d 316 (N.Y. 1995) involved a principal who altered student test scores on the citywide reading and mathematics tests, resulting in significantly higher indications of proficiency than most students could actually demonstrate in class. The plaintiff was one such student. Teachers believed he had a learning disability, and even tested him for such. The principal pulled the student out of the special needs class, admonished the mother for “going over his head” in seeking an evaluation, denied the student had any difficulties, and denied him access to remedial assistance that would have been available but for the tampering with his test answers. When the student left elementary school and began attending an intermediate school, it was learned that his actual reading and mathematical abilities were significantly below what his elementary scores indicated but consistent with his classroom work. Notwithstanding, the student did not receive special services until he was in high school, which by that time his academic difficulties were exacerbated by depression, anxiety, and isolation. An internal investigation revealed the principal had, in fact, altered student test papers for several years. Relying in part on Donahue and Hoffman, *supra*, the court reiterated that New York does not recognize educational malpractice as a negligence theory for recovery of damages. However, actions for fraud and other intentional torts “may be viable if properly pleaded and proved.” At 318. However, “only actual pecuniary losses are sustainable as damages in a fraud cause of action.” *Id.* Whether the governing body is liable for the principal’s actions depends upon the facts. “When an employee commits an intentional tort, his intentional

conduct may be said to have been within the scope of his employment when his employer could have reasonably anticipated the conduct.” The employer does not actually have to foresee the conduct or the exact manner in which the “injury” occurred “as long as the general type of conduct may have been reasonably expected.” *Id.* The citywide test results were used to rank the schools. The principal’s school’s ranking had risen dramatically, which raises a question as to whether the principal’s actions were generally foreseeable such that the governing body would be liable.<sup>11</sup>

Fraud or intentional torts are distinguished from “educational malpractice” claims, but demonstrating damages will remain problematical. However, a governing body—or the State—may be liable where there are dramatic improvements that are not otherwise demonstrated other than by standardized scores. A standard of “reasonableness” may be applied to the local and state agencies as to whether they are on notice of such untoward acts that the resulting injury would be “foreseeable.” Although *Helbig* involved school rankings, recent cases have involved school personnel attempting to demonstrate improvements in student performance for professional advancement. There have been resulting injuries to students, notably denial of access to remedial programs, denial of funding for remedial programs, false reporting of school performance, and inaccurate progress reports to affected parents.<sup>12</sup>

### **School Accountability: “Negligent Accreditation”**

Where a state establishes certain guidelines for school accountability and, typically, accreditation, but the school does not meet these requirements but is, nonetheless, accredited, does this establish liability? This was a central question in *Ambrose v. New England Assoc. of Schools and Colleges*, 252 F.3d 488 (1<sup>st</sup> Cir. 2001), where seven disgruntled students sought to establish tort liability against the accrediting organization for alleged injuries to third persons (the students). The students enrolled at the private college to pursue associate degrees in medical assisting. However, the college’s program did not provide any clinical experience, resulting in six of the seven students unable to find employment in this field after graduation. The seventh student found employment but was shortly dismissed for lack of clinical experience. The plaintiffs allege the college’s course catalogs and accreditation statements amounted to fraud, negligent misrepresentation, and deceptive business practices. The court noted that fraud requires a five-part showing that encompasses (1) a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act in reliance upon it, as well as a showing that (5) the plaintiff justifiably relied upon the representation as true and acted upon it to his detriment. At 492.

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<sup>11</sup>The principal tampered with test scores from 1979 to 1990, causing his elementary school’s ranking to rise from 173 to number 3. See *Sica v. Bd. of Ed. of City of New York*, 640 N.Y.S.2d 610, 612 (N.Y. 1996), based on the same principal’s actions. In this 4-3 decision, the suit was dismissed on a technical matter, much to the chagrin of the dissent, which noted that *Helbig* contemplated such actions might be filed.

<sup>12</sup>The issue of cheating on high stakes assessment will be addressed in the next **Quarterly Report**.

“Negligent misrepresentation,” on the other hand, occurs when:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Id., citing *Restatement (Second) of Torts*, §552(1) (1977), the exact provision relied upon by the Iowa Supreme Court in Sain v. Cedar Rapids, *supra*. Although fraud and negligent misrepresentation are distinct torts, they possess a common element: a false representation. The court determined that no such false representations were made.

Following accreditation of an institution of higher education, the accrediting organization typically places the school on a ten-year evaluation cycle. Each decennial review is preceded by a self-assessment followed by a peer review that evaluates the school regarding eleven standards (mission and purposes; planning and evaluation; organization and governance; programs and instruction; faculty; student services; library and information resources; physical resources; financial resources; public disclosure; and integrity). This accreditation process does not address specific programs of a school. The accreditation process requires a certain amount of flexibility.

[B]enchmarks for accreditation are not intended as reference points for laymen. To the contrary, their *raison d’etre* is to guide professionals in a particular field of endeavor (here, education). In constructing such benchmarks, standards that are definitive in theory easily may become arbitrary in application. Flexibility blunts the sharp edges of this potential hazard.

At 495. There is a “real world problem” by “attempting to gauge diverse institutions by a universal barometer.” Id. The accrediting organization’s statement that the college met or exceeded each of the standards was not false or misleading. Such accreditation is “not a guarantee of the quality of every course or program offered or the competence of individual graduates.” Id.

Although the court does not use the term “educational malpractice,” it does address what may very well become a mutant strain—negligent accreditation—using the same rationale employed by other courts to refuse to intervene in such matters.

Although the appellants cloak their claim in the raiment of misrepresentation, this seems to be little more than creative labeling. The claim, as the appellants present it, boils down to a claim for negligent accreditation—a claim that [the defendant] acted carelessly in conferring accreditation because the College did not in fact meet [the defendant’s] own accreditation requirements. Such a claim invites us to substitute our judgment for that of professional educators regarding the College’s suitability for accreditation. We decline the invitation.

At 497. The court, in fact, expressed the opinion that “[w]e very much doubt the existence of a cause of action for negligent accreditation on behalf of third parties.” At 499. There are also “strong policy arguments that militate against endowing ill-served students of accredited schools with a means to challenge the decisions of accrediting agencies.” *Id.* These standards are similar to “educational malpractice” claims: (1) there are no ascertainable standards of care by which to evaluate educators’ professional judgments; and (2) there is the undesirability of having courts intervene in an attempt to assess the efficacy of the operations of academic institutions. *Id.*, noting the similarities with “educational malpractice” claims.

### **STUDENT-ATHLETES AND SCHOOL TRANSFERS: RESTITUTION, HARDSHIP, CONTEMPT OF COURT, AND ATTORNEY FEES**

Since 1903, the Indiana High School Athletic Association (IHSAA) has been the sanctioning body for interscholastic athletic competition at the secondary level. The principal reason for its existence is to discourage “school jumping” and other “undue influences” that result in student-athletes transferring to other schools primarily for athletic reason.<sup>13</sup>

In an effort to police membership and halt “school jumping,” the IHSAA created a number of by-laws regarding transfers, foreign exchange students, undue influence, eligibility, hardship, academics, and restitution, along with a host of other by-laws directed towards individual sports.

Although participation in interscholastic competition is still regarded as a privilege, its influential role in secondary education has resulted in increased litigation by student-athletes challenging IHSAA decisions. This litigation reached a climax when the Indiana Supreme Court issued two important decisions in 1997: *IHSAA v. Carlberg*, 694 N.E. 2d 222 (Ind.1997), *reh. den.* (1998) and *IHSAA v. Reyes*, 694 N.E. 2d 249 (Ind. 1997). These two important cases resolved issues regarding the status of the IHSAA when its decisions are subjected to judicial scrutiny; the IHSAA’s status relative to student-athletes; and the IHSAA’s status relative to its member schools.<sup>14</sup>

The Supreme Court acknowledged that athletics in Indiana play an “integral role” in the constitutionally mandated system of publicly funded education, *Carlberg*, 694 N.E. 2d at 228-29, but high school students do not choose to belong to the IHSAA. At 230. As a result, the IHSAA’s decisions affecting students will be held to a stricter review standard. The IHSAA’s actions in this regard will be considered “state action” subject to judicial scrutiny as to whether such decisions are arbitrary and capricious. At 229-31.

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<sup>13</sup>For related articles, see “IHSAA: ‘Fair Play,’ Student Eligibility, and the Case Review Panel,” *Quarterly Report* January-March: 2000; “Athletics No Paeon, No Gain,” *Quarterly Report* April-June: 1997, July-September: 1997; and “Basketball in Indiana: Savin’ the Republic and Slam Dunkin’ the Opposition,” *Quarterly Report* January-March: 1997.

<sup>14</sup>The IHSAA’s “private membership organization” relationship with its member schools will be addressed in the article following this one.

Carlberg and Reyes involved the IHSAA's "Transfer Rule," which will typically deny a student full eligibility if he transfers schools without a corresponding change of residence by the student's parents. Although the IHSAA has a "Hardship Rule" that can apply under certain circumstances,<sup>15</sup> the IHSAA was not arbitrary and capricious when it declined to provide full eligibility for Carlberg even though the IHSAA acknowledged that the student did not transfer primarily for athletic reasons nor as the result of undue influence. Carlberg, at 232.

Raised as an issue in both Carlberg and Reyes was the IHSAA's "Restitution Rule," which penalizes a school that permits a student to participate in interscholastic competition pursuant to a court order even though the IHSAA determined the student ineligible. Should the restraining order or injunction be vacated, stayed, reversed, or determined judicially not to be justified, the school may be required to forfeit games; return certain gate receipts, trophies or awards; and vacate or strike individual or team records.

Although trial courts and the Indiana Court of Appeals have been critical of the Restitution Rule, the Supreme Court declined to apply the "arbitrary and capricious" standard of review in Reyes because the party challenging the application of the rule was not the student but the public school district. The relationship between the member school district and the IHSAA is one of a "voluntary membership association." As a result, judicial intervention is warranted only where there are allegations of "fraud, illegality, or abuse of civil or property rights having their origin elsewhere." Reyes, 694 N.E. 2d at 257.

The school district argued that the Restitution Rule showed disrespect of the judiciary by threatening member schools of such potential losses that they will defy trial court orders. The Supreme Court disagreed, stating that this is one of the consequences of choosing to be a member of the IHSAA. The Supreme Court added that "[u]ndeniably, the Restitution Rule imposes hardship on a school that, in compliance with an order of a court which is later vacated, fields an ineligible player." Reyes at 257.

The Restitution Rule may not be the best method to deal with such situations. However, it is the method which member schools have adopted. And in any event, its enforcement by the IHSAA does not impinge upon the judiciary's function.

At 258.

### ***The Restitution Rule and Student-Athletes***

Reyes involved a school district's challenge to the Restitution Rule. The Supreme Court determined the relationship between the school district and the IHSAA as essentially a contractual one, in the sense that it was a voluntary membership organization. The State's highest court did not view the Restitution Rule as being disrespectful of or otherwise interfering with judicial functions.

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<sup>15</sup>See IHSAA and Martin and IHSAA v. Durham, *infra*.



But what if the party challenging the Restitution Rule is the student-athlete?

This has become a central issue in the dispute involving the transfer of Jessah Martin, a gifted basketball player, from her public school to a parochial school noted for the success of its girls' basketball team. Her dispute has been to the Indiana Court of Appeals four times with three published opinions. The student in the dispute attended the public school for the majority of her high school years. By all accounts, her relationship with her parents had significantly deteriorated. Her father spread rumors that she was engaged in an affair with an assistant coach, and sought to have the assistant coaches fired. Her mother, who works in the school district, joined in the campaign to fire the assistant coaches. In addition, her parents prohibited her from talking with her coaches or school counselors.

When she turned 18 years of age, she left her parents house and moved in with an assistant coach and his family and sought counseling at a treatment facility. The treatment facility advised that she not return to the public school because of the turmoil and anxiety this was causing her. She enrolled in a nearby parochial school and sought full eligibility. The public school, however, officially opposed her transfer even though her coaches supported it. Described as a "very private and self-conscious" person, the "rumors, innuendoes, and embarrassing questions from other students" may have resulted in Post-Traumatic Stress Disorder. IHSAA v. Martin, 731 N.E. 2d 1,10 (Ind. App. 2000), *reh. den.*, *trans. den.*

The IHSAA denied full eligibility based on its Transfer Rule because she changed schools without a corresponding change of residence by her parents. It also determined that the facts in her case—which were not contradicted—did not support an application of the IHSAA's "Hardship Rule."<sup>16</sup> Martin obtained a permanent injunction against the IHSAA, which was granted. On appeal, the Indiana Court of Appeals affirmed the trial court's granting of injunctive relief even though Martin voluntarily decided not to participate in sports at the parochial school.

The appellate court reiterated the Carlberg standard of arbitrariness and capriciousness, noting that IHSAA decisions would be reversed only where its decisions are "willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion." Martin, 731 N.E. 2d at 6 (citation omitted).

The Court of Appeals determined the student met the requirements of the "Hardship Rule" because the evidence was uncontradicted that the circumstances resulting in her transfer were beyond her control; the purpose of the "Transfer Rule" would still be met if she had full eligibility; the spirit of the rule would not be violated; and undue hardship would result from strict enforcement of the "Transfer Rule." 731 N.E. 2d at 10. In addition, her transfer was due to a hostile environment and not primarily for athletic reasons. Had the "IHSAA suspected a

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<sup>16</sup> The "Hardship Rule" allows the IHSAA to set aside the effect of any of its by-laws where strict enforcement in the particular case would not serve to accomplish the purpose of a particular by-law; the spirit of the by-law has not been violated; and there exists evidence demonstrating an undue hardship would result if the by-law were enforced.

ruse on Martin's behalf, they should have presented evidence to this effect. Instead, they offered nothing... and admitted that there was no evidence which contradicted Martin's evidence." 731 N.E. 2d at 11. The appellate court criticized this approach:

We note the IHSAA uses the possibility of an athletically-motivated transfer, although admittedly not primarily athletically-motivated and only possibly secondarily athletically-motivated, as a way to ultimately keep Martin from receiving a hardship exception. Thus, the IHSAA's use of this "purpose" creates a poison pill for which a student could be denied a hardship under any circumstances if IHSAA suspects that the student may possibly be moving for an athletic reason regardless of whether this would be his or her primary reason for transferring or whether there was any evidence to that affect. Certainly, athletic transfers violate the IHSAA's rules; however, if the IHSAA declares that a student is not transferring for primarily athletic reasons, it cannot, without any evidence at all, allege that the student may be transferring secondarily for athletic reasons in order to deny a student a hardship exception.

Id.<sup>17</sup> The principal of the parochial school also appealed separately the trial court's injunction, but this appeal was subsequently dismissed. This portion of the Martin dispute is not published.

### **Martin and the Restitution Rule**

On December 29, 2000, the Court of Appeals issued two separate decisions, both 2-1, flowing from the continuing Martin controversy.

In IHSAA v. Martin, 741 N.E. 2d 757 (Ind App. 2000), the appellate court affirmed the trial court's finding that the IHSAA was in contempt of the court and assessment of a fine against it.

Although the earlier Martin case indicated she voluntarily chose not to participate in athletics at the parochial school, see Martin, 731 N.E. 2d at 5, apparently she was prevented from playing by the school out of fear of the IHSAA's Restitution Rule, notwithstanding the court's injunction. Martin, 741 N.E. 2d at 761-762. Martin petitioned the trial court for a finding of contempt by the IHSAA because the IHSAA's threat of applying the Restitution Rule effectively denied her the relief the trial court granted her. The IHSAA countered that the court's injunction did not specifically require it to waive its "Restitution Rule." 741 N.E. 2d at 762.

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<sup>17</sup>It should be noted that the IHSAA did grant Martin "limited eligibility," which would permit her to compete at the junior varsity level. Given Martin's abilities, this grant of limited eligibility, which could be illusory, is beside the point. The appellate court determined there was no evidence justifying the IHSAA's actions in denying a hardship exception.

The trial court determined the IHSAA was in contempt of the preliminary injunction, found the preliminary injunction was sufficiently specific, that the IHSAA had actual knowledge of the injunction, the IHSAA purposefully and knowingly violated the preliminary injunction, and the violation took place during the time the injunction was in effect. This conduct, the trial court found, demonstrated willful contempt by the IHSAA of the court's order by threatening the school in order to force compliance with the IHSAA's original determination of ineligibility. The trial court assessed a \$500-a-day fine against the IHSAA so long as it was in contempt, although it could "purge itself of contempt by specifically waiving enforcement of the Restitution Rule as it would be applied to Martin." 741 N.E. 2d at 764-65. The IHSAA never waived its rule.

The Court of Appeals noted that the challenge here is not the IHSAA's action but its inaction.

In what appears to be a unique if not novel situation, school officials have, contrary to a trial court's preliminary injunction, ultimately decided to disallow a student athlete the right to participate in a sport for which she is otherwise athletically qualified, because these officials fear the threat of the IHSAA's Restitution Rule.

741 N.E. 2d at 765. The appellate court noted the IHSAA had been temporarily "enjoined and restrained from attempting to enforce, implement or carry out in any manner, directly or indirectly," its determination that Martin was ineligible for varsity athletics; and that this order was not ambiguous and was sufficiently stated so as that the IHSAA knew what it could do and what it could not do. The trial court's order did not have to specifically mention or require the waiver of the Restitution Rule in order to be "clear and certain." Accordingly, the contempt finding was affirmed. 741 N.E. 2d at 766-67.

The appellate court stated that it was not ruling on the validity of the Restitution Rule, this question having been decided by the Supreme Court in Reyes.

However, to hold that a failure to act is not contemptuous merely because to act would render inapplicable a valid IHSAA rule would rob an injunction or restraining order of its meaning. Injunctions are equitable remedies. [Citations omitted.] As such, prohibitory preliminary injunctions are court orders which restrain acts that interfere with the rights of the party in whose favor the injunction is granted. [Citation omitted.] Thus, an injunction may, for equity's sake, make invalid an otherwise valid action, in order to protect the rights of the party in whose favor the injunction was granted.

741 N.E. 2d at 766. The court also found the \$500-a-day assessment was proper. 741 N.E. 2d at 773.

### **Martin and Attorney Fees**

The fourth Martin decision was also a 2-1 decision, affirming the trial court's award of attorney fees to Martin. IHSAA v. Martin, 741 N.E. 2d 775 (Ind App 2000). Although "Indiana follows the 'American Rule' which provides that each party to litigation pay his or her own attorney fees, absent a statute, agreement or stipulation to the contrary" [citation omitted], Indiana statute does provide "for an award of attorney fees in an action to enforce an injunction." 741 N.E. 2d at 778. The Court of Appeals rejected the IHSAA's argument that the attorney fee judgment was an additional sanction based on the same contempt action for which the \$500-a-day penalty was assessed. The appellate court characterized the sanction as coercive, in that it was intended to force the IHSAA to comply with the preliminary injunction. The attorney fee award, however, was remedial because it compensated Martin for the attorney fees she incurred as a result of the contempt proceedings. 741 N.E. 2d at 779.

The Indiana Supreme Court has granted transfer of these latter decisions, which will require it to revisit the Restitution Rule albeit under different facts (a student versus an IHSAA-member school), and answer the question whether injunctive relief requires the IHSAA to waive its Restitution Rule when applied against a student.<sup>18</sup>

### **Durham and the Hardship Rule**

While Martin occupied a considerable amount of the appellate court's attention, another important dispute was awaiting decision. IHSAA v. Durham, 748 N.E. 2d 404 (Ind. App. 2001) involves not only the "Hardship Rule" but the lack of standards sometimes employed by the IHSAA when determining eligibility. The student had attended a private school for the first two years of high school. However, due to divorce, his mother could no longer afford the tuition. He and his brothers transferred to the public high school. The mother presented evidence to the IHSAA that the divorce had resulted in a 67 percent decrease in family income, with substantial debt and other expenses weighing heavily on the remaining income, including two mortgages on the family residence and a tax lien. The private school and the public school supported full eligibility for the student at the public school.

The IHSAA, however, denied him full eligibility and further determined he did not qualify for consideration under the "Hardship Rule," even though the IHSAA agreed the change in financial circumstances was "permanent and substantial." Durham sought injunctive relief from the trial court, which was granted. The court later issued a permanent injunction, finding the IHSAA's actions were arbitrary and capricious, especially since the IHSAA apparently employs an "income test" that does not appear in its by-laws. A student should not need to prove a poverty status in order to come within the requirements of the Hardship Rule. 748 N.E. 2d at 406-09.

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<sup>18</sup>As for attorney fees, Chief Justice Randall Shepard, in a concurring opinion in Reyes, indicated he would have assessed attorney fees against the IHSAA for questioning the jurisdiction of the courts over it, even though numerous federal and state courts have ruled that the courts do have jurisdiction. "I see no reason why parties engaged in litigation with the IHSAA should have to pay their lawyers to respond to this contention. Thus, if we had been asked to do so, I would vote to order payment of attorney fees on this issue." Reyes, 694 N.E. 2d 249, 258 (Ind. 1997), Chief Justice Shepard (concurring).

The IHSAA argued that the decision to apply the “Hardship Rule” is within its discretion, and it does not have to do so even where a student meets its criteria. The appellate court disagreed, noting that acceptance of this argument would effectively deny a student the right of judicial review, contrary to Carlberg, *supra*. Further, the IHSAA argued that it does not have to have ascertainable standards. This was unavailing. “If the IHSAA is truly analogous to a governmental agency [as determined in Carlberg], then it must also establish standards on which to base its decisions.” 748 N.E. 2d at 413. Accordingly, “we hold that trial courts may determine whether the denial of a hardship exception in a particular case was the result of arbitrary and capricious action by the IHSAA.” 748 N.E. 2d at 414.

The Court of Appeals criticized the IHSAA for inserting its “poison pill” tactic of insinuating an athletic motivation where no evidence exists to support this.<sup>19</sup> The court also cited the 7<sup>th</sup> Circuit Court of Appeals’ criticism in Crane v. IHSAA, 975 F. 2d 1315, 1323, 1325 (7<sup>th</sup> Cir. 1992), where the IHSAA ignored the “plain language of its rules” and instead used “rambling rationalizations” to come to a “pre-ordained result.” 748 N.E. 2d at 415.

Given the evidence supplied by the family as to the change in their financial situation, “no reasonable person could conclude that the Durhams have not met [the requirements]... listed in the Hardship Rule.” At 416. The Hardship Rule does not require a student to demonstrate that he is a “hardship case.”

In fact, financial hardship or poverty is not contained within the change in financial condition provision of the Hardship Rule generally. Instead, the “hardship” referred to in the Hardship Rule focuses on the hardship faced by the student athlete if the rule is strictly enforced.... Just as in Crane, the IHSAA is attempting to adjust its interpretation of the Hardship Rule to meet the particulars of this case.

Id. The court added: “The IHSAA should not be in the business of second-guessing personal financial decisions, but should accept circumstances as they are.” Id.<sup>20</sup>

## ATHLETIC CONFERENCES, CONSTITUTIONAL RIGHTS, AND UNDUE INFLUENCE

The Indiana Supreme Court, in its comprehensive review of Indiana law, determined in Indiana High School Athletic Assoc. (IHSAA) v. Carlberg, 694 N.E. 2d 222 (Ind. 1997), *reh. den.* (1998), that the IHSAA is engaged in “state action” only with respect to student-athletes

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<sup>19</sup>See Martin, *supra*, 731 N.E. 2d at 11, where the Court of Appeals first described this tactic as a “poison pill.”

<sup>20</sup> The Durham dispute was one of the precipitating factors in the creation of the Case Review Panel (CRP) in 2000 by the Indiana General Assembly. See I.C. 20-5-63 *et seq.* The CRP entertains appeals by student-athletes from adverse decisions of the IHSAA. Its decisions are available on-line at [www.doe.state.in.us/legal/](http://www.doe.state.in.us/legal/).

because athletics are an integral part of constitutionally mandated education, students do not choose to be members of the IHSAA, and they have no voice regarding the IHSAA's rules or its leadership. For this reason, courts will review the IHSAA's student eligibility decision to determine whether they are arbitrary and capricious. Carlberg, 694 N.E. 2d at 230-31, 233.

This does not apply to the public and private schools that are members of the IHSAA. The IHSAA is a voluntary membership association with respect to its member schools. The relationship is contractual in nature. For this reason, judicial review of the IHSAA decisions involving its member schools will be restricted to issues of "fraud, other illegality, or abuse of civil or property rights having their origin elsewhere." Carlberg, 694 N.E. 2d at 230; IHSAA v. Reyes, 694 N.E. 2d 249, 256-57 (Ind. 1997).

Justice Brent Dickson agreed that the IHSAA was engaged in "state action" for the purpose of federal and state constitutional review, but he dissented in both Carlberg and Reyes to the limitations placed on the review of the IHSAA decisions affecting member schools. Carlberg, 694 N.E. 2d at 234; Reyes, 694 N.E. 2d at 258. He noted that the IHSAA is the only governing body for high school athletics in Indiana, and it should not be considered a "voluntary" association and avoid meaningful judicial review. The "arbitrary and capricious" standard should be applied to all IHSAA decisions, especially to enforcement of such by-laws as the "Restitution Rule," which in its application, is more punitive than remedial.

### ***The U.S. Supreme Court and "State Action"***

The U.S. Supreme Court faced virtually the same issue as the Indiana Supreme Court: Is a statewide association incorporated to regulate interscholastic athletic competition among public or private secondary schools regarded as engaging in "state action" when it enforces a rule against a member school? The U.S. Supreme Court reached a decision contrary to the one reached by the Indiana Supreme Court in Carlberg and Reyes. Its 5-4 decision in Brentwood Academy v. Tennessee Secondary School Athletic Association (TSSAA), 121 S.Ct. 924 (2001) determined that the TSSAA's regulatory activity is state action, especially in consideration of the "pervasive entwinement of state school officials in the structure of the association." 121 S.Ct. at 927-28.<sup>21</sup>

Brentwood Academy is a parochial school and a TSSAA member. It wrote letters to incoming students and their parents advising them of spring football practice. TSSAA has a rule against the use of "undue influence" in the recruitment of athletes. TSSAA, whose board of control and legislative council were composed of public school administrators, determined Brentwood used "undue influence." As a result, it placed Brentwood's athletic program on probation for four

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<sup>21</sup> Other than the intimate role of the Tennessee State Board of Education in reviewing TSSAA's rules and the opportunity for TSSAA's employees to join the state's public retirement system, the TSSAA is financed and governed the same as the IHSAA, and its by-laws and enforcement mechanisms are likewise similar to the IHSAA's.

years, declared its boys' football and basketball teams ineligible to compete in playoffs for two years, and imposed a \$3,000 fine.

Brentwood filed suit, asserting the TSSAA's actions violated the First and Fourteenth Amendments. The district court found for Brentwood, but the 6<sup>th</sup> Circuit Court of Appeals reversed.

In reversing the 6<sup>th</sup> Circuit, the Supreme Court majority stated that "state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." 121 S.Ct. at 930 (citation and internal punctuation omitted).

Although the TSSAA is a private organization, it is delegated public functions by the State and is pervasively intertwined with public institutions and public officials in its composition and its workings.<sup>22</sup> "[T]here is no substantial reason to claim unfairness in applying constitutional standards to [TSSAA]." 121 S.Ct. at 932.

Interscholastic athletics obviously play an integral part in the public education of Tennessee, where nearly every public high school spends money on competitions among schools.

Id.<sup>23</sup> Its membership is predominantly public schools and public school officials. Meetings occur during school hours, and public schools provide the lion's share of financial support for the TSSAA. Id.

In sum, to the extent of 84 percent of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. "Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards [.]" 121 S.Ct. at 933. Accordingly, the Supreme Court's majority determined the TSSAA was engaged in state action and could be sued for alleged civil rights violations by a member school. 121 S. Ct. at 935.

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<sup>22</sup> As the court noted, 84 percent of the TSSAA's membership are public schools. The IHSAA's membership includes every Indiana public high school and approximately thirty private or parochial schools.

<sup>23</sup> The majority and dissent in Carlberg agreed on the integral role of athletics in constitutionally mandated education.

### ***“Undue Influence” and the IHSAA***

The Brentwood dispute was initiated by a group of Tennessee public high school coaches who accused the parochial school of violating TSSAA’s rule against contacting prospective student athletes. Brentwood purportedly provided free game tickets to a coach at a public middle school and invited incoming students from the middle school to attend spring football practice. The U.S. Supreme Court did not find that TSSAA violated Brentwood’s First and Fourteenth Amendment rights. Rather, it determined TSSAA was engaged in state action and could be sued by a member school for alleged violations of the U.S. Constitution.

After the Brentwood decision was released, the IHSAA amended its by-laws on “undue influence” (Rule 20) to include four new subsections apparently intended to prevent a Brentwood scenario. Two of the new subsections are as follows:

#### **C–20-3**

Coaches from member school programs may only visit the practices and/or contests of their respective feeder school/s.

- a. "Coaches" include contracted and volunteer, high school and middle/junior high, and anyone representing the respective school or athletic program for the purposes of searching out and contacting students and/or parents for the encouragement of enrollment for the purpose of athletic participation at a particular school.
- b. Representatives of a school’s athletic program may not visit the homes of non-feeder school students or use other means of communication for the purpose of encouraging enrollment and athletic participation at a particular school.
- c. Coaches of non-school teams may not be used as agents to direct non-feeder school students to another school.

#### **C–20-5**

Following their eighth grade year, students may not attend a high school’s athletic camps or clinics unless they are attending a feeder school or have enrolled in the sponsoring school. Athletic brochures, special invitations, camp fliers, etc. shall not be issued to select students from non-feeder schools unless specifically requested by the parent/s.



These amendments have the following serious flaws:

- Many private and parochial schools that are members of the IHSAA are free-standing schools with no “feeder schools” in the traditional sense;
- Notwithstanding the above, the IHSAA does not define what it means by a “feeder school”;
- The repeated use of “and/or” in Rule C-20-3 creates automatic ambiguities that likely will be construed against the IHSAA in any legal dispute<sup>24</sup>;
- The use of the “etc.” in Rule C-20-5 likewise creates ambiguities; and
- The amended rule seems to be based on a presumption that a member school is limited by Carlberg and Reyes, which might be accurate if a member school challenged application of these amendments in a *state* court.

A member school, under Brentwood, could challenge the IHSAA’s amended rule in federal court and not be restricted to the limited review of voluntary associations enunciated in Carlberg and Reyes. For federal purposes, the IHSAA is engaged in state action even with respect to its member schools.

### COURT JESTERS: SMOKE AND IRE

“Lawyers,” the late Oliver Wendell Holmes, Jr., said, “spend a great deal of their time shoveling smoke.”<sup>25</sup>

But where there’s smoke, there’s fire. Although countless judges before and after Holmes have held the opinion that lawyers shovel quite a few things other than smoke, their frustration seldom appears in print. Admonishments are reserved usually for the courtroom or chambers.

That didn’t happen in Bradshaw v. Unity Marine Corp., Inc., 147 F.Supp.2d 668 (S.D. Tex. 2001).

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<sup>24</sup> The use of “and/or” is fraught with peril. Highly disfavored by courts, the main problem is the ambiguity it creates. Is it “and” or “or”? In Employers’ Mutual Life Ins. Co. v. Tollefsen, 219 Wisc. 434, 437 (1935), the court wrote: “... ‘and/or,’ that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with a view to furthering the interest of their clients.” The North Carolina Supreme Court felt likewise in Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645, 653 (1954): “The presiding judge murdered the King’s, the Queen’s, and everybody’s English by using the monstrous linguistic abomination ‘and/or’ in this portion of the order. We are constrained to adjudge, however, that the judge’s law is better than his grammar.” Where legal rights are being determined, courts will construe any ambiguity in a writing against the one who drafted the language.

<sup>25</sup> *Attributed*, Laurence J. Peter, Peter’s Quotations (1977).

Frustrated at the poorly researched, poorly written, and unprofessional advocacy displayed by the two attorneys involved in the instant matter, federal District Court Judge Samuel B. Kent began his opinion by attempting to affirm the two attorneys by acknowledging that they are “two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston,” where the court sits. This may not be coincidence, the judge wrote at 670:

Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.

The attorney for the defendant “begins the descent into Alice’s Wonderland by submitting a Motion that relies upon only one legal authority,” and it’s the wrong one. “A more bumbling approach is difficult to conceive—but wait folks, There’s More!”

The plaintiff’s attorney “responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument,” but not only cites the wrong cases for support, but cites a case with no apparent applicability and with an incorrect citation.<sup>26</sup> “It is almost as if Plaintiff’s counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough, hitting a nonexistent volume!).” *Id.* But Judge Kent did not wish to appear to be too harsh, following these comments with this affirmation:

[Despite plaintiff’s counsel’s shortcomings], the Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotted about Plaintiff’s briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.

At 671. Notwithstanding the parties’ “joint, heroic efforts to obscure” the issue, the court ruled in the defendant’s favor.

Despite the waste of perfectly good crayon seen in both parties’ briefing (and the inexplicable odor of wet dog emanating from such), the Court believes it has satisfactorily resolved this matter. Defendant’s Motion for Summary Judgment is **Granted**.

At 672 (emphasis original). The judge wasn’t finished, however. Although this defendant had succeeded in escaping this dispute, there still remains another defendant with whom the plaintiff’s attorney must contend. This party’s attorney may prove more formidable than the other defendant’s counsel.

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<sup>26</sup>The judge wrote “(What the...)?!” after the plaintiff’s citation.

[I]t is well known around these parts that Unity Marine's lawyer is equally likable and has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.

Id. Judge Kent, in an accompanying footnote, apparently thought better of encouraging plaintiff's counsel to enhance his writing skills.

In either case, the Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand—he could put his eye out.

Whatever these attorneys were shoveling, the judge called a spade a spade.

### QUOTABLE...

Showing that one tree has borne no fruit does not prove that an entire apple orchard is barren.

First Circuit Court of Appeals Judge Bruce M. Selya, in Ambrose v. New England Association of Schools and Colleges, Inc., 252 F.3d 488, 497 (1<sup>st</sup> Cir. 2001), declining to recognize “negligent accreditation” as imposing liability on an accrediting organization because the plaintiff students were disgruntled with a medical assistance program offered by a college accredited by the organization. (Discussed in “Educational Malpractice: Emerging Theories of Liability,” *supra*.)

### UPDATES

#### ***Decalogue: Epilogue***

For the past year, the progress of two important federal lawsuits involving the display of the Ten Commandments has been reported.<sup>27</sup> The Supreme Court has denied certiorari in Books v. City

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<sup>27</sup>See “The Decalogue: Thou Shalt and Thou Shalt Not,” **Quarterly Report** April-June: 2000; “Decalogue: Epilogue,” **Quarterly Report** October-December: 2000; and “Updates” in the **Quarterly Report** January-March: 2001.

of Elkhart, 235 F.3d 292 (7<sup>th</sup> Cir. 2000), a 2-1 decision. See City of Elkhart v. Books, 121 S.Ct. 2209 (2001). Indiana Civil Liberties Union, Inc. v. O'Bannon, 110 F.Supp.2d 842 (S.D. Ind. 2000) was pending in the 7<sup>th</sup> Circuit when the Supreme Court declined review. This decision addressed the constitutionality of a proposed monument for the south lawn of the State Capitol that would have prominently displayed the Ten Commandments. The district court found the display of the monument at the State Capitol likely would be unconstitutional and issued an injunction against its erection. There had been a monument for many years on the south lawn until it was removed due to vandalism. The impetus for the current proposed monument was the passage of P.L. 22-2000 by the Indiana General Assembly, which permits—but does not mandate—Indiana public schools and other state and local political subdivisions to post “[a]n object containing the words of the Ten Commandments” so long as this object is placed “along with documents of historical significance that have formed and influenced the United States legal or governmental system,” and the object containing the Ten Commandments is not fashioned in such a way as to draw special attention to the Ten Commandments apart from other displayed documents and objects. I.C. 4-20.5-21 and I.C. 36-1-16.

On July 27, 2001, the 7<sup>th</sup> Circuit upheld the district court’s decision, again by a 2-1 count. Indiana Civil Liberties Union, Inc., et al. v. O'Bannon, 259 F.3d 766 (2001). Under the three-prong test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), the Establishment Clause of the First Amendment is violated if any of the following are determined:

- (1) The state action does not have a secular purpose;
- (2) The primary effect of the state action is the advancement or inhibition of religion; or
- (3) The state action fosters excessive entanglement with religion.

The first two prongs are often incorporated into one “endorsement test,” which is the thrust of the 7<sup>th</sup> Circuit’s analysis. “Under the endorsement test we focus on whether the state’s action has the purpose or effect of conveying a message of endorsement or disapproval of religion..” At 770. The court could find no secular purpose.

We have recognized that the Ten Commandments is a religious and sacred text that transcends secular ethical or moral concerns. [Citation omitted.] This is so in part because its very text commands the reader to worship only the Lord God, to avoid idolatry, to not use the Lord’s name in vain, and to observe the Sabbath.

These particular commandments are wholly religious in nature, and serve no conceivable secular function.

At 770-71. The court did not state that the display of the Ten Commandments would always violate the Establishment Clause. It noted, as other courts have, that within certain contexts—which is apparently what the Indiana legislature was attempting to do—the display could be considered serving a secular purpose. In this case, however, the proposed monument would emphasize the Ten Commandments and would not associate this display with any articulated secular purpose. As a result, “the State has not articulated a valid secular justification for planning to erect the monument.” At 771-72.

As to the “primary effect,” the court concluded that a reasonable person would believe the monument’s design was intended to endorse religion. The 7<sup>th</sup> Circuit rejected the argument that any religious message emanating from the monument would be tempered by the presence of other monuments on the south lawn. “[T]his is not simply some museum nestled in some secluded part. The grounds...[constitute] the seat of Indiana government.” At 772.

[W]e are hard-pressed to conclude anything other than that a reasonable observer would think that this monument, regardless of the message it conveys, occupies this location with the support of the state government. And, since we find that a reasonable observer would think the monument conveys a religious message, we hold that it impermissibly endorses religion.

Id. “The permanence, content, design, and context of the monument amounts to the endorsement of religion by the state,” the court wrote at 773. “...[W]e are hard-pressed to believe that a trial on the merits will support a different conclusion.” Id.

### ***Charter Schools***

As noted in “Chartering a New Course in Indiana: Emergence of Charter Schools in Indiana,” **Quarterly Report** January-March: 2001, the Indiana General Assembly has defined a “charter school” in Indiana as a public elementary or secondary school. I.C. 20-5.5-1-4. As such, charter schools will need to ensure that they comply with various federal and state laws regarding accessibility to programs and services. One of the areas that will immediately affect a charter school will be the accessibility of its building and its parking lot or facility for students and other persons with mobility impairments. The Office for Civil Rights recently addressed such a situation with a Minnesota charter school. See PEAKS Charter School (MN), 35 IDELR 37 (OCR 2000).

The Duluth campus of the charter school was not accessible to students or other persons with mobility impairments. The charter school entered into a voluntary settlement agreement with OCR, assuring that it would comply with the accessibility standards under the Americans with Disabilities Act of 1990 by modifying routes and entrances to ensure they are of appropriate width; by ensuring its programs and activities are accessible to students with disabilities, particularly those programs and services presently housed in inaccessible buildings; and by ensuring there are sufficient numbers of accessible parking spaces located on the shortest accessible route of travel from the adjacent parking lot to an accessible entrance. The parking spaces must be of appropriate width and have proper signage.

Indiana, by statute, dictates the minimum number of accessible parking spaces. I.C. 5-16-9-2(a) provides in relevant part:

Total No. of Parking SpacesMinimum No. of Reserved Spaces

1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1,000	2% of total
Over 1,000	20 + 1 for each 100 spaces over 1,000

Indiana law also contemplates placement of accessible parking spaces along the “shortest accessible route of travel to an accessible entrance” to a building served by the parking area. Accessible parking areas must contain proper signage, including the international symbol of accessibility on a vertical sign measuring at least 48 inches from the base of the sign, with specific requirements for lettering, color of characters, and background. See I.C. 5-16-9-2(e),(f). The Indiana law applies the ADA accessibility standards.

Date: \_\_\_\_\_

\_\_\_\_\_  
Kevin C. McDowell, General Counsel  
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at <[www.doe.state.in.us/legal/](http://www.doe.state.in.us/legal/)>.

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